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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 PAUL ADAMS,
12 CDCR #F-92755,

13 Plaintiff,

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15 vs.
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17 LARRY SMALL; J. TIM OCHOA;
18 ACEVES; WATERS; ANAYA; SILVA;
19 TRUJILLO; CATE; WILKINS; FOSTON;
20 DOES 1 - 50,

21 Defendants.
22

Civil No. 10cv1211 MMA (POR)

ORDER:

**(1) DISMISSING DEFENDANTS
CDCR, STATE OF CALIFORNIA,
DIRECTOR OF CORRECTIONS
AND UNITED STATES OF
AMERICA;**

**(2) GRANTING PLAINTIFF'S
MOTION TO SERVE SUMMONS
AND DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF SECOND
AMENDED COMPLAINT
PURSUANT
TO FED.R.CIV.P. 4(c)(3)
& 28 U.S.C. § 1915(d)**

23 **I.**

24 **PROCEDURAL HISTORY**

25 On June 4, 2010, Plaintiff, Paul Adams, a state prisoner currently incarcerated at
26 Ironwood State Prison located in Blythe, California and proceeding pro se, filed a civil rights
27 action pursuant to 42 U.S.C. § 1983. Plaintiff also filed a Motion to Proceed In Forma Pauperis
28 ("IFP") pursuant to 28 U.S.C. § 1915(a). On June 28, 2010, the Court granted Plaintiff's Motion

1 to Proceed IFP and sua sponte dismissed his Complaint for failing to state a claim. *See* June 28,
 2 2010 Order at 5-6. On December 1, 2010, Plaintiff filed his First Amended Complaint (“FAC”).
 3 Once again, the Court conducted a sua sponte screening and dismissed his First Amended
 4 Complaint for failing to state a claim. *See* Feb. 9, 2011 Order at 6. Plaintiff filed his Second
 5 Amended Complaint (“SAC”) on March 2, 2011.

6 II.

7 SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) AND § 1915A

8 As the Court stated in its previous Orders, the Prison Litigation Reform Act (“PLRA”)
 9 obligates the Court to review complaints filed by all persons proceeding IFP and by those, like
 10 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
 11 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
 12 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”
 13 *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte
 14 dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails
 15 to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. §
 16 1915(e)(2)(B) and § 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
 17 (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

18 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 19 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
 20 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
 21 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
 22 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of
 23 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
 24 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
 25 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 26 (discussing 28 U.S.C. § 1915A).

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1 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 2 allegations of material fact and must construe those facts in the light most favorable to the
 3 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 4 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 5 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
 6 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
 7 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

8 In his Second Amended Complaint, Plaintiff no longer names the CDCR, the State of
 9 California, the Director of Corrections, or the United States of America as Defendants in this
 10 matter. The Court informed Plaintiff in its February 9, 2011 Order that any Defendant not re-
 11 named and all claims not re-alleged in the Second Amended Complaint would be deemed to
 12 have been waived. *See* Feb. 9, 2011 Order at 6 (citing *See King v. Atiyeh*, 814 F.2d 565, 567
 13 (9th Cir. 1987)). Thus, these Defendants are **DISMISSED** from this action.

14 As for the remainder of Plaintiff’s Amended Complaint, the Court finds that Plaintiff’s
 15 claims are now sufficiently pleaded to survive the sua sponte screening required by 28 U.S.C.
 16 §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff is entitled to U.S. Marshal service on his
 17 behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court shall
 18 issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he
 19 court may order that service be made by a United States marshal or deputy marshal ... if the
 20 plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is
 21 cautioned, however, that “the sua sponte screening and dismissal procedure is cumulative of, and
 22 not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to
 23 bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

24 III.

25 CONCLUSION AND ORDER

26 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

27 1. Defendants CDCR, the State of California, the Director of Corrections, or the
 28 United States of America are **DISMISSED** from this action pursuant to 28 U.S.C. §§ 1915(e)(2)

1 and 1915A(b). The Clerk of Court is directed to terminate these Defendants from the Court's
2 docket.

3 **IT IS FURTHER ORDERED** that:

4 2. Plaintiff's Motion to Serve Summons [ECF No. 17] is **GRANTED**. The Clerk
5 shall issue a summons as to Plaintiff's Second Amended Complaint [ECF No. 15] upon the
6 remaining Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285
7 for each of these Defendants. In addition, the Clerk shall provide Plaintiff with a certified copy
8 of this Order, the Court's June 28, 2010 Order granting Plaintiff leave to proceed IFP [ECF No.
9 3], and certified copies of his Second Amended Complaint and the summons for purposes of
10 serving each Defendant. Upon receipt of this "IFP Package," Plaintiff is directed to complete
11 the Form 285s as completely and accurately as possible, and to return them to the United States
12 Marshal according to the instructions provided by the Clerk in the letter accompanying his IFP
13 package. Thereafter, the U.S. Marshal shall serve a copy of the Second Amended Complaint and
14 summons upon each Defendant as directed by Plaintiff on each Form 285. All costs of service
15 shall be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

16 3. Defendants are thereafter **ORDERED** to reply to Plaintiff's Second Amended
17 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
18 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted
19 to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or
20 other correctional facility under section 1983," once the Court has conducted its sua sponte
21 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary
22 determination based on the face on the pleading alone that Plaintiff has a "reasonable
23 opportunity to prevail on the merits," Defendants are required to respond).

24 4. Plaintiff shall serve upon Defendants or, if appearance has been entered by
25 counsel, upon Defendants' counsel, a copy of every further pleading or other document
26 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
27 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
28 of any document was served on Defendants, or counsel for Defendants, and the date of service.

1 Any paper received by the Court which has not been filed with the Clerk or which fails to
2 include a Certificate of Service will be disregarded.

3 **IT IS SO ORDERED.**

4 DATED: March 30, 2011

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6 Hon. Michael M. Anello
7 United States District Judge
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